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In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF LARRY OSA OGBOMON, PETITIONER

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INTEREST OF *AMICI CURIAE*

The American Immigration Lawyers Association ("AILA") and the National Association of Criminal Defense Lawyers ("NACDL") submit this brief as *amici curiae* in support of Larry Osa Ogbomon, Petitioner, with the consent of all parties.

Amicus AILA, founded in 1946, is a national non-profit association of immigration, nationality and citizenship lawyers with 34 chapters across the United States and Canada including over 4,200 members. AILA is an affiliated organization of the American Bar Association. AILA's objectives are to advance the administration of law pertaining to immigration, nationality and citizenship; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

Amicus NACDL was founded over 25 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is to ensure the proper administration of criminal justice and to advocate the preservation of constitutional rights in this country. Moreover, NACDL seeks to promote fair and consistent application of laws protecting the rights of individuals, including constitutional and statutory safeguards affecting the rights of non-citizens.

Amici have a profound interest in the development of sound precedent with regard to the constitutionally proper separation of powers among and between the

Congress, the Executive and the Judiciary in creating, administering and defining laws affecting the rights of non-citizens. Criminal defendants are never popular. Aliens (non-citizens)[1] are not often popular, and the pendulum of public (including Congressional) opinion is currently on an anti-alien swing. Criminal aliens, then, represent the nadir of popularity: they also comprise an especially vulnerable group, and present special challenges to counsel and to the courts.[2]

SUMMARY OF ARGUMENT

18 U.S.C. § 3583(d) does **not** authorize a district court to order deportation as a condition of supervised release: at most, it authorizes the district court to order a defendant, as a condition of supervised release, to surrender to the Immigration and Naturalization Service ("INS") for whatever procedures may ensue under the Immigration and Nationality Act ("INA").[3] This majority reading of

[1] As used in this brief, and unless otherwise specified, the terms "citizen" and "non-citizen" refer to those who possess or lack *U.S.* citizenship, since almost everyone is a citizen of *some* country, and very few people are truly "stateless".

[2] "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Mr. Justice Murphy, concurring).

[3] This is the view of the Solicitor General, and of the First, Second, Fourth, Fifth and Tenth Circuits; in its contrary view the Eleventh Circuit stands alone, and that by a bare majority: the twelve-member en banc panel which decided *U.S. v. Oboh*, 92 F.3d 1082 (11th Cir. 1996), was divided seven-to-five, with the dissent following the position of Petitioner herein.

the statute is most consistent with traditional rules of statutory construction, with the proper separation of powers between the courts and the administrative agencies, and with the constitutional due process and equal protection rights of the accused.

INTRODUCTION

In the past decade, Congress has radically altered the body of immigration law, beginning with the Immigration Reform and Control Act of 1986 ("IRCA"),[4] and on through the Immigration Act of 1990 ("IMMACT90"),[5] the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"),[6] the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"),[7] and the Anti-terrorism and Effective Death Penalty Act ("AEDPA").[8] Just a few weeks ago Congress enacted the most sweeping immigration reform bill in perhaps the last forty years, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"),[9] which, ironically, President Clinton signed into law on September 30, 1996, the day before the petition for certiorari was granted in the instant case. All of these statutes limit the rights and enlarge the responsibilities of aliens and their

[4] P.L. 99-603, 100 Stat. 3359.

[5] P.L. 101-649, 104 Stat. 4978.

[6] P.L. 103-322, 108 Stat. 2026.

[7] P.L. 103-416, 108 Stat. 4305.

[8] P.L. 104-132, 110 Stat. 1214.

[9] P.L. 104-208, 110 Stat. 3009.

families and employers. Additionally, these statutes increasingly purport to limit the role of the judiciary in reviewing agency action under the immigration laws.

The portion of the statute at issue, however – the last sentence of 18 U.S.C. § 3583(d) – has not been altered since its enactment in 1986. The Eleventh Circuit alone, however, has interpreted this statute to *increase* the district court's power to involve itself in immigration law matters, precisely at a time when Congress and the other Circuits have been moving in the opposite direction.

The relationship between Congress, the agencies (in this case, the INS and the Executive Office for Immigration Review ("EOIR")) and the federal courts is likely to be subject to a time of trial, given the radical and unprecedented peacetime preclusion of review ("court-stripping") provisions of the AEDPA and the IIRAIRA; nevertheless, neither the IIRAIRA, nor the AEDPA, nor any other modification of the immigration laws or criminal sentencing laws of the past decade gives support to the Eleventh Circuit's position.

Criminal defendants in general face increasingly daunting hurdles: see, e.g., §§ 105-106 of the AEDPA (limiting habeas corpus relief); *Felker v. Turpin*, 116 S.Ct. 2333, 135 L.Ed. 2d 827 (1996). When the defendant is a non-citizen, the noose tightens even further: see, e.g., *Hincapie-Nieto v. INS*, 92 F.3d 27 (2nd Cir. 1996) (court-stripping provision of § 440(a) of AEDPA permissible, given that limited habeas corpus relief jurisdiction remains). *Amici* believe that the Eleventh Circuit in *U.S. v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), cert. denied, 115 U.S. 102 (1994) and in *U.S. v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (en banc) has breached the limits of what is statutorily and constitutionally possible in this intersection of criminal law and immigration law.

Amici herein agree with the way in which the First, Second, Fourth, Fifth and Tenth Circuits have construed the proper meaning and reach of 18 U.S.C. § 3583(d), in particular, the ways in which those Circuits have approached the historical development of the statute, and the way in which the 10th Circuit, in particular, approached the issues of statutory interpretation and separation of powers, *U.S. v. Phommachanh*, 91 F.3d 1383, 1385-88 (10th Cir. 1996). To supplement those approaches, however, amici herein address the issues of administrative law safeguards and constitutionally-mandated due process and equal protection which the Eleventh Circuit so cavalierly dismisses, *U.S. v. Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996).

ARGUMENT

I. THE ELEVENTH CIRCUIT'S APPROACH DENIES DEFENDANTS RECOURSE TO CRITICAL ADMINISTRATIVE PROCEDURES AND SAFEGUARDS, AND TO MEANINGFUL JUDICIAL REVIEW.

Amici acknowledge that for some defendants, due to the nature of their criminal histories, there can be no administrative relief, and deportation is the certain sequel to the criminal proceedings.[10] For others, the

[10] See generally, Kowalski, *Sentencing Options for the Deportable Non-Citizen*, 8 Fed. Sent. R. 286 (1996).

sentencing courts may have already invoked either the "judicial deportation" provisions of 8 U.S.C. § 1228(c)(1-4),[11] or the new "stipulated deportation" provisions of 8 U.S.C. § 1228(c)(5)[12] and 18 U.S.C. § 3563(b).[13]

There will always be, however, a significant number of defendants who will be entitled to, and who do not wish to waive their rights to, administrative procedures under the INA to determine their alienage, admissibility, excludability and/or deportability, and relief from removal.[14] For these defendants, the administrative procedures detailed below are critical to their assertion of the right to remain in the United States.

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[11] As renumbered by the IIRAIRA; formerly 8 U.S.C. § 1252a(d).

[12] As added by Sec. 374(a) of the IIRAIRA.

[13] As added by Sec. 374(b) of the IIRAIRA.

[14] The lexicon of immigration law has been radically altered by the IIRAIRA: whereas the INA for forty years or more used the terms "entry", "exclusion", "deportation" and various forms of relief therefrom, the INA as reworked by the IIRAIRA now speaks of "admission", and of a single "removal" hearing process, relief coming in the form of "cancellation of removal". It will take practitioners, the agencies and the courts some time to understand and implement these new concepts.

A. Alienage.

The ultimate defense to deportation[15] is U.S. citizenship: only aliens[16] are subject to deportation. This most precious birthright is not always obvious, especially in the case of a person born abroad to one or more U.S. citizen parents. A long and very complex portion of the INA, 8 U.S.C. §§ 1401-1504, governs U.S. citizenship and nationality by birth, by naturalization, and loss of nationality. A significant body of scholarship and caselaw has built up over the years on this subject.[17]

In the administrative hearing process, the first order of business, upon which all others turn, is the issue of alienage. Under the current system,[18] in exclusion proceedings the burden is on the applicant for admission to establish the fact of U.S. citizenship "to the examining immigration officer's satisfaction", 8 C.F.R. § 235.1(b), failing which he will be treated as an alien; 8 U.S.C.

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[15] The terms "deportation" and "deportability" will be used throughout this brief – and little or no mention will be made of "exclusion" or "removal" – for two reasons; the statute at issue speaks of "deportation"; and the differences between "deportation", "exclusion" and "removal" are not pertinent to this case.

[16] Any person not a citizen or national of the United States; 8 U.S.C. § 1101(a)(3).

[17] *See, e.g.*, Aleinikoff, *The Tightening Circle of Membership*, 22 Hast. Con. L. Q. 915 (1995); *Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996).

[18] of exclusion or deportation proceedings, which, subject to exceptions not relevant here, will remain in force until April 1, 1997, at which time the new unified "removal" hearing process, instituted by the IIRAIRA, will come into full play.

§§ 1225-26. Similarly, in deportation proceedings, the first allegation in the charging document – the Order to Show Cause – is that the respondent is not a native or citizen of the United States; the burden is on the government to prove that fact by "clear, unequivocal and convincing evidence", 8 C.F.R. § 242.14(a). Finally, in the new "removal" proceedings to take effect next year, it appears that the burden is on the government to prove alienage by "reasonable, substantial, and probative evidence"[19] before any deportation order may enter.

Immigration attorneys, INS attorneys and Immigration Judges are experienced in handling the situation when the respondent in proceedings – alleged to be an alien – raises a citizenship defense. The matter is treated with the utmost seriousness and care. Extra time is taken and extreme caution is exercised by all parties, since the ultimate travesty of justice in immigration law is the deportation of a U.S. citizen, which is always unconstitutional, *Ng Fung Ho v. White*, 259 U.S. 276 (1922). Once citizenship is established and is uncontested, proceedings are terminated.

In contrast, the question arises whether the district courts within the Eleventh Circuit, when implementing 18 U.S.C. § 3583(d), have taken or will take the same care in determining the primordial issue – alienage? The statute speaks simply of "an alien defendant . . . subject to deportation", without any further statutory or regulatory

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[19] New INA Sec. 240(c)(3)(A), added by Sec. 304 of the IIRAIRA.

reference to the manner in which alienage itself is determined. Are prosecutors, defense attorneys, pretrial service officers, probation officers, and district courts currently aware that alienage is not self-evident? Is alienage being presumed due to name or appearance or accent? Have defendants who unknowingly enjoy U.S. citizenship by descent or derivation been wrongfully deported under 11th Circuit doctrine?

The administrative process safeguards the precious birthright of U.S. citizenship, the ultimate defense against deportation. The Eleventh Circuit's implementation of 18 U.S.C. § 3583(d), without more, does not, and for this reason alone, should not be permitted to continue.

B. Deportability.

Once alienage is established, in the administrative hearing process, the next order of business is to determine whether or not the alien is deportable (or admissible or excludable or removable) under the lodged charge or charges. The current grounds[20] of excludability and deportability are extensive, and by no means intuitive: most importantly, no court sitting in a criminal case should assume that the criminal charge at bar necessarily triggers an exclusion or deportation ground.

Under current exclusion hearing law, the burden is on the alien to prove admissibility, with two important exceptions: if a U.S. consular post has issued a visa, it is prima facie evidence of admissibility, sufficient to shift

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[20] INA Secs. 212 & 241, 8 U.S.C. §§ 1182 & 1252.

the burden to the INS, *Matter of Walsh & Pollard*, Int. Dec. 3111 (BIA 1988); and, if the applicant is a returning resident, the INS has the burden of proving inadmissibility, and the applicant is entitled to full due process rights, *Landon v. Plasencia*, 459 U.S. 21 (1982).

Under current deportation hearing law, the INS must prove deportability (as well as alienage) by "clear, unequivocal and convincing evidence", 8 C.F.R. § 242.14(a). Under the coming removal hearing law, if the alien is applying for admission, the alien will have the burden of proving "clearly and beyond doubt [that he is] entitled to be admitted and is not inadmissible",[21] whereas if the alien has been lawfully admitted, and the INS seeks to deport (remove) him, the INS will have the burden of proving deportability by "clear and convincing evidence".[22]

In contrast, neither the text nor the context of 18 U.S.C. § 3583(d) gives any guidance as to how deportability is to be determined, nor by whom, nor does it state who has what burden of proof, if any. Further, at this juncture it is important to highlight that 18 U.S.C. § 3583(d) speaks of an alien defendant "subject to deportation", without specifying whether said deportability is triggered by the conviction at bar, or prior conduct, or both.

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[21] New INA Sec. 240(c)(2)(A), added by Sec. 304 of the IIRAIRA.

[22] New INA Sec. 240(c)(3)(A), added by Sec. 304 of the IIRAIRA.

Immigration practitioners know that, while in many cases deportability is conceded at the initial pleading stage (and that the deportability of an alien convicted of an "aggravated felony"[23] is conclusively presumed by statute[24]), in many other cases the battle is won or lost over the issue of deportability. When deportability is in doubt, the doubt is resolved in favor of the alien: *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Matter of Hou*, Int. Dec. 3178 (BIA 1992). Again, as with the primordial issue of alienage, do prosecutors, defense counsel, courts and ancillary staff have any understanding of the grounds of exclusion and deportation? Are courts in the 11th Circuit willing to take the time to determine whether, in fact, the convictions at bar trigger any of those grounds? Are defense counsel willing and prepared to challenge a court's finding of deportability?[25]

The current administrative hearing process provides a time-tested forum in which to determine and challenge deportability. The 11th Circuit's interpretation of 18 U.S.C. § 3583(d) does not.

C. Relief and Administrative Review.

In the administrative hearing process, once alienage and deportability (or excludability or inadmissibility)

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[23] INA Sec. 101(a)(43), 8 U.S.C. § 1101(a)(43).

[24] INA Sec. 242A(c), 8 U.S.C. 1252a(c).

[25] Note that in several jurisdictions, failure of defense counsel to advise the defendant of the immigration consequences of a conviction could render the assistance of counsel ineffective: *see, e.g., People v. Pozo*, 746 P.2d 523 (Colo. 1987).

have been established, the parties explore avenues of relief. Indeed, applications for relief from exclusion and deportation are a mainstay in administrative exclusion and deportation hearings. Immigration counsel, INS counsel, and Immigration Judges routinely deal with applications for withdrawal of application for admission,[26] admission based on waivers,[27] asylum,[28] withholding of deportation,[29] suspension of deportation,[30] and voluntary departure.[31] The Immigration Judge has an affirmative duty to advise the alien of "apparent eligibility" for relief from deportation. 8 C.F.R. § 242.17(a).

18 U.S.C. § 3583(d), however, appears to bar any and all relief from deportation. Of course, some defendants will be aliens, will be deportable, and will be ineligible for any relief from deportation, due to the conviction at hand, or prior conduct, or a combination of the two. Others, however, would be eligible for relief – if they were afforded administrative hearings before Immigration Judges. For example, if an alien who had been a lawful permanent resident for more than seven years were convicted of any of certain federal misdemeanors not involving weapons, controlled substances, or a "crime of violence" or other "aggravated felony" under the INA, and were sentenced to probation, under the

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[26] *Matter of Lepofsky*, 14 I&N Dec. 718 (BIA 1974).

[27] such as INA Secs. 212(c), (d)(3), (e), (g), (h), or (i), 8 U.S.C. §§ 1182(c), (d)(3), (e), (g), (h), or (i).

[28] INA Sec. 208, 8 U.S.C. § 1158.

[29] INA Sec. 243(h), 8 U.S.C. § 1253(h).

[30] INA Sec. 244(a), 8 U.S.C. § 1254(a).

[31] INA Sec. 244(e), 8 U.S.C. § 1254(e).

current statutory scheme the alien may be eligible for relief from deportation. This relief, however, can only be given by the Immigration Judge in an exclusion or deportation hearing. Moreover, many forms of relief involve the exercise of the Attorney General's discretion, discretion specifically delegated to the Immigration Judges and the Board of Immigration Appeals ("BIA" or "Board"), but not to federal district court judges. In sum, there is no mechanism under 18 U.S.C. § 3583(d) by which the district court may determine eligibility for relief and grant relief, especially discretionary relief.

After a hearing before an Immigration Judge, either party may take an administrative appeal to the Board, a body of twelve attorneys within the Executive Office for Immigration Review ("EOIR").[32] The Board is a creature of regulation, but has been in continuous existence, in one form or another, for over forty years. Its institutional memory and expertise, though often challenged by the immigration bar in the federal courts, is substantial. Its body of caselaw is the primary focus of study and litigation by the immigration bar, and is, after the Constitution, the INA, the regulations, and federal caselaw, the main source of authority for the day-to-day implementation of the INA. It issues thousands of unpublished decisions each year; published decisions, designated as precedents, are binding.[33]

During the pendency of an appeal to the Board, an order of exclusion or deportation by an Immigration

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[32] 8 C.F.R. §§ 3.0-3.8.

[33] 8 C.F.R. § 3.1(g).

Judge is stayed.[34] The Board, having the full authority of the Attorney General to take such action "as is appropriate and necessary for the disposition of the case",[35] may affirm or reverse the decision of the Immigration Judge, including any credibility determination, may review the facts and the law *de novo*, may take administrative notice of new facts, and may, at times, consider new evidence not adduced at hearing.[36]

Under pre-IIRAIRA law, the Board has been, for many, the *de facto* last stop. Although judicial review (below) has been review as a matter of right, the cost of counsel has prohibited most from challenging adverse Board decisions. As the IIRAIRA becomes fully implemented, the Board may become, *de jure*, the court of last resort, if the IIRAIRA's preclusion of review provisions are upheld. Although the Board is often criticized by the immigration bar and sometimes by the courts,[37] it has nonetheless provided a necessary, intelligent, more dispassionate and humane forum for the review of the decisions of Immigration Judges;[38] at the very least, its vast institutional experience is a resource of immense importance to the INS and the immigration bar.

Deportation by court decree under the Eleventh Circuit's reading of 18 U.S.C. § 3583(d), however, deprives

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[34] 8 C.F.R. § 3.6.

[35] 8 C.F.R. § 3.1(d)(1).

[36] *See, e.g., Charlesworth v. U.S.I.N.S.*, 966 F.2d 1323 (9th Cir. 1992).

[37] *See, e.g., Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995).

[38] *See, e.g., Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

the defendant of this critical step in the decisional process. Federal district courts, no matter how often they hear immigration cases, will never match the institutional memory of the Board.

D. Judicial Review.

The IIRAIRA has wrought a revolution in the judicial review of agency action under the immigration laws. It may take years to achieve stability or clarity with respect to issues of constitutionality, jurisdiction, venue and time limitations. In general, the judicial review provisions of the IIRAIRA, Sec. 306(a)(2), create a new INA Sec. 242, entitled "Judicial Review of Orders of Removal", and create a unitary petition for review process to review "all final orders of deportation or removal", IIRAIRA Sec. 306(c)(1). The jurisdictional provisions, effective dates, and transitional rules, however, of IIRAIRA Secs. 306 and 309 are unclear, conflicting, and may be unconstitutional. It is not at all clear that the IIRAIRA judicial review provisions would apply to Petitioner's case. For purposes of this brief, then, the discussion will focus on pre-IIRAIRA judicial review of final orders of deportation and exclusion.

Under pre-IIRAIRA law, an alien in exclusion proceedings may seek direct judicial review of an adverse BIA decision via a petition for writ of habeas corpus in district court, under INA Sec. 106(b), 8 U.S.C. § 1105a(b). An alien in deportation proceedings may seek direct judicial review of an adverse BIA decision via petition for review in the circuit court of appeals, under INA Sec. 106(a), 8 U.S.C. § 1105a(a). On review, the district court or

circuit court may affirm or reverse the BIA's decision, or remand for further action. Over the years, hundreds if not thousands of aliens have had deportation or exclusion orders overturned only through the mechanism of direct judicial review, a matter of statutory right.

The 11th Circuit in *U.S. v. Oboh*, 92 F.3d 1082 at 1087, intimates that sufficient judicial review of an order of deportation under 18 U.S.C. § 3583(d) is afforded "through appellate review of the conviction and the sentence." As shown above, however, there appear to be no mechanisms within 18 U.S.C. § 3583(d) to determine alienage, deportability, and eligibility for relief from deportation at the district court level. Under these circumstances, there would not be a sufficient basis for a circuit court, on "appellate review of the conviction and sentence", to review a district court's decisions on issues of alienage, deportability and relief. From the reported decision, the sum total of "due process" afforded to Mr. Oboh appears to have been the following: at a sentencing hearing, the government offered an INS document "revealing" that Oboh had entered the U.S. unlawfully; Oboh objected to the introduction of the document; apparently over objection, the district court found that Oboh entered the U.S. unlawfully; and, based on that finding, the district court ordered Oboh deported as a condition of supervised release.

On appeal, the circuit court "summarily reject[ed] Oboh's argument that the district court's order of deportation denied him due process. The plain language of 3583(d) gave Oboh sufficient notice that the district court could deport him as a condition of supervised release upon a finding that he was 'subject to deportation.' "

Oboh at 1087-88. From the reported decision it seems clear that neither the district court nor the circuit court dealt in any meaningful fashion with the issues of alienage, deportability and relief. Moreover, it appears that the burden of disproving deportability was placed on Mr. Oboh, with no defined standard of proof.

If, at a sentencing hearing, a defendant, alleged to be an alien, were to raise a citizenship defense, or to challenge deportability, or to ask for relief from deportation, the district court, under the 11th Circuit's view, would apparently have unlimited authority to nevertheless find that the defendant was an alien, subject to deportation. In Mr. Oboh's case, all it took was an INS document "revealing" (not, apparently, proving, by any standard or burden of proof) his unlawful entry. Further, it appears that the 11th Circuit would not challenge such a finding, reducing judicial review to a nullity.

The pre-IIRAIRA scheme of administrative hearings under the INA, followed by judicial review, provides a time-tested method for adjudicating the issues of alienage, deportability and relief. The 11th Circuit's approach provides none, and should be rejected. "[W]hen fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.' " *Crowell v. Benson*, 285 U.S. 22, 62 (1932), citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

II. THE ELEVENTH CIRCUIT'S APPROACH VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

A. Due Process.

While this Court has never gone so far as to classify deportation as a criminal punishment, nevertheless the Court has recognized that deportation ranks as one of the most severe civil sanctions in the law. "[D]eportation is a drastic measure and at times the equivalent of banishment or exile. . . . Such a forfeiture is a penalty." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Analytically, the threat of deportation touches on the defendant's liberty interests; his freedom from detention and his freedom to remain in the United States: "Here the liberty of an individual is at stake. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).[39]

Under the 5th Amendment, no person – whether citizen or alien – may be deprived of liberty without due

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[39] Prolonged detention is not merely an academic issue: for example, the 9th Circuit, en banc has recently held (erroneously, in the opinion of *amici*) that excludable Mariel Cubans who have been criminally convicted and who have fully served their sentences may be subsequently detained by the Attorney General indefinitely, given Cuba's refusal to accept their repatriation. *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995). Even in the case of a non-Cuban alien, if an INS detainer is placed on an alien defendant, his opportunities for halfway house placement, shock incarceration program (18 U.S.C. § 4046) and the like, are nullified, thus lengthening his incarceration.

process of law. Reduced to its barest outlines, due process requires that the accused be heard. "[I]t is not competent for [agency officers to] arbitrarily cause an alien, who has entered this country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." *Yamayata v. Fisher*, 189 U.S. 86, 100-101 (1903).

With this constitutional mandate as a backdrop, current[40] administrative exclusion and deportation procedures (and judicial deportation procedures, with the exception of 18 U.S.C. § 3583(d) as interpreted by the 11th Circuit) exhibit certain salient features:

– service on the respondent of written factual allegations and charges of violations of law;[41]

– advice to the respondent that he may be represented by counsel;[42]

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[40] pre-IIRAIRA

[41] INA §§ 242(b)(1) & 242A(d)(2)(B), 8 U.S.C. §§ 1252(b)(1) & 1252a(d)(2)(B); 8 C.F.R. §§ 235.6(a) & 242.1(b).

[42] INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); 8 C.F.R. §§ 236.2(a) & 242.1(c).

– advice to the respondent that he may examine the evidence against him, present his own evidence, and cross-examine government witnesses;[43] and

– further administrative and/or judicial review.[44]

This process of notice, right to counsel, hearing, and appellate review has developed by accretion, beginning from the dark days when aliens had, at most, cursory examination by agents of the executive branch, subject to cursory judicial review by petition for writ of habeas corpus.[45] Due process for aliens no longer means whatever minimal process Congress decides to give: "[T]he Court[46] really could not have meant carte blanche for Congress in the treatment of excludable aliens. Surely, had Congress revived trial by ordeal, or the ducking stool, or gladiatorial contests as the procedures for deciding who could enter, the Court – even the Court of the early 1950's – would have found a way to strike down such a practice."[47]

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[43] INA §§ 242(b)(3) & 242A(d)(2)(D); 8 U.S.C. §§ 1252(b)(3) & 1252a(d)(2)(D); 8 C.F.R. §§ 236.2(a) & 242.16.

[44] INA §§ 236(b) & 242A(d)(3), 8 U.S.C. §§ 1226(b) & 1252a(d)(3); 8 C.F.R. §§ 236.7 & 242.21.

[45] For a summary, *see Heikkila v. Barber*, 345 U.S. 229 (1953).

[46] in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

[47] Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U.Pitt.L.Rev. 165, 173 (1983).

Given the liberty interests at issue, the evolution of the due process rights of non-citizens is not surprising.[48] The 11th Circuit's reading of 18 U.S.C. § 3583(d), however, harks back to the darkest, earliest days of immigration law: Mr. Oboh, for example, was ordered deported solely on the strength of a document (of unknown admissibility under the rules of evidence) which purported to "reveal" that he had entered the U.S. unlawfully, resulting in deportation by administrative revelation and judicial decree, not due process of law.

Amici support the textual approaches used by the other Circuits in interpreting 18 U.S.C. § 3583(d), and understand that the Court has an interest in resolving cases by means other than constitutional analysis, but respectfully suggest that a constitutional due process analysis should be brought to bear in this case as well. In doing so, the Eleventh Circuit's approach will be shown to be constitutionally infirm.

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[48] That evolution is about to take a new turn: much of the law of constitutional due process and equal protection for aliens has turned on the issue of whether the alien was in "exclusion" or "deportation" proceedings, and whether the alien had any prior status (such as lawful permanent resident status), so as to increase his "stake" in the process. See, e.g., Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Comm. 9 (1990); Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum.L.Rev. 1625 (1992); Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. (1990). Now, in the nascent IIRAIRA epoch, given the IIRAIRA's unitary "removal" hearing process to determine "admissibility", it remains to be seen how the Court will shape or re-shape the contours of constitutional due process and equal protection for aliens.

B. Equal protection.

> "Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."

DiPasquale v. Karnuth, 158 F.2d 878, 879 (2nd Cir. 1947) (Learned Hand, J.).

In the instant case, the caprice, the meaningless and irrational hazard, is the bad luck of alien defendants to be sentenced in the Eleventh Circuit. The Eleventh Circuit alone gives district courts the choice of using judicial deportation procedures which comply with constitutional due process requirements, or remanding the alien to the INS for administrative deportation procedures, which likewise comport with constitutional due process requirements – or, without reason or warning, applying 18 U.S.C. § 3583(d) as interpreted by the Eleventh Circuit to effect a "quick and dirty" judicial deportation, without any constitutional due process.

> "It has long been held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356 . . . (1886). . . . Under the minimal scrutiny test, . . . distinctions between different classes of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all

> persons similarly circumstances shall be treated alike." *Stanton v. Stanton*, 421 U.S. 7 . . . (1975)."

Francis v. INS, 532 F.2d 268, 272 (2nd Cir. 1976).

The application of the "arbitrary distinction" test for equal protection analysis was evident in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994). Prior to *Garberding*, the BIA had held that expungements under the Federal First Offender Act (FFOA) or state equivalents erased certain drug convictions so as not to trigger certain grounds of deportability, but that the state expungements were not recognized where the state statute allowed expungement of drug offenses more serious than the mere possession covered by the FFOA. In *Garberding*, the 9th Circuit ruled that the BIA's rule violated equal protection, because the states varied in their expungement laws:

> "Here, there is no rational basis for treating Garberding differently. Had she possessed her marijuana in Michigan, Virginia or Wisconsin, she would not have been subject to deportation. These states have expungement statutes which are the exact counterpart of the FFOA. Garberding had the bad luck or poor judgment to possess her marijuana in Montana. The state legislature in Montana has seen fit to extend the privilege of expungement to persons who are convicted of drug offenses more serious that Garberding's simple first time possession. It is this fortuitous circumstance, not Garberding's conduct, which the INS used to distinguish her for deportation. This may indeed reflect a policy of harsh treatment of aliens who commit drug offenses, but distinguishing Garberding for deportation because of the breadth of Montana's expungement statute, not because of what she

> did, has no logical relation to the fair administration of the immigration laws or the so-called 'war on drugs.' "

Garberding at 1990-91.

Similarly, in the instant case, under *Yick Wo,* this Court should not permit the Eleventh Circuit alone to interpret 18 U.S.C. § 3583(d) in a much broader way than all other Circuits. To paraphrase the *Garberding* court, distinguishing Mr. Ogbomon for judicial deportation under 18 U.S.C. § 3583(d) because of the breadth of the Eleventh Circuit's reading of that statute, not because of what he did, has no logical relation to the fair administration of the federal criminal code. Constitutional equal protection includes protection against disparate treatment based on geographical chance.

CONCLUSION

The Eleventh Circuit's interpretation of 18 U.S.C. § 3583(d) permits district courts to directly order the deportation of certain defendants, bypassing critical administrative and judicial procedural safeguards, in violation of the defendants' constitutional due process and equal protection rights. *Amici* respectfully pray for an order vacating the decision below and remanding for a decision consistent with the views expressed herein and with the interpretations of the First, Second, Fourth, Fifth and Tenth Circuits.

Respectfully submitted,

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